Volume 82
Issue 2 *Dickinson Law Review - Volume 82, 1977-1978*

1-1-1978

Unreviewability of General Counsel's Discretion: Proposed Amendments for a Private Cause of Action for Unfair Labor Practices

Barbara L. Romberger

Unreviewability of General Counsel's Discretion: Proposed Amendments for a Private Cause of Action for Unfair Labor Practices

I. Introduction

The victim of an unfair labor practice, as defined by the National Labor Relations Act [1] (NLRA), would at first glance appear to have several avenues for obtaining relief. He might process his claim through either the state or federal courts or the National Labor Relations Board.[2] The success of a court action, however, depends on whether the claim fits into an exception carved out of the NLRB's broad jurisdiction over the labor field.[3] If it is not within one of the exceptions, the case is dismissed for lack of jurisdiction. In all cases, the injured party may apply directly to the General Counsel and request that he prosecute the claim before the NLRB. The General Counsel is not required to adjudicate all claims, however. In fact, he advises withdrawal or dismisses seventy percent of the charges filed.[4] By judicial interpretation of the NLRA, a decision by the General Counsel to dismiss is not subject to review.[5] Thus, in situations in which the injured party has no independent right to proceed through the courts and the General Counsel declines to prosecute, an individual has no opportunity to present his claim.

General Counsel's absolute authority has been criticized by Congressmen,[6] commentators,[7] employees, labor, and management[8] because

1. National Labor Relations Act, 29 U.S.C. §§ 141-87 (1970).

2. This comment deals exclusively with the remedies available under the federal labor laws. Pennsylvania state remedies are beyond the scope of this comment.

3. *See* notes 74-76 and accompanying text *infra*.

4. 40 NLRB ANN. REP. 11 (1975). In fiscal year 1975, 35.5% of the charges were withdrawn before complaint and 35.5% were dismissed. *Id.*

5. NLRB v. Lewis, 249 F.2d 832 (9th Cir. 1957).

6. In a recent statement Congressman John Erlenborn noted that he would be satisfied if Congress did no more than "reform the General Counsel's unreviewable discretion to issue a complaint. He is unique in our jurisprudence; being vested, as he is, with authority to decide whether a complaining party will get his day in court." Address by Congressman Erlenborn, 1974 ABA Conference on Labor Relations, ABA 1974 PROGRAM AND PROCEEDINGS OF LAB. REL. LAW REP. 218,225.

7. Bartosic, *Labor Law Reform—The NLRB and a Labor Court*, 4 GA. L. REV. 647 (1970); Morris, *The Case for Unitary Enforcement of Federal Labor Law—Concerning a Specialized Article III Court and the Reorganization of Existing Agencies*, 26 SW. L.J. 471 (1972). *See* note 197 *infra*.

8. Testifying before a congressional committee, Charles Loomis, an employee active in union organization, stated that he was fired for failure to report for work after being rescheduled without notification. After a hearing no action was taken. In a letter to the

of the unpredictability of its application and potential for abuse. One solution to the problem caused by judicial abstention is the express provision for an individual right of action to vindicate private rights. The House has recently rejected an amendment designed to correct the problem through expansion of the right to proceed without representation by the General Counsel.[9] This comment will explore the rationale of the policy of unreviewability and the arguments for change. A brief survey is included of other federal agencies that recognize private actions, and the two legislative proposals will be analyzed to determine how they will remedy the problem.

II. Background

A. History and Procedure of the Office of the General Counsel

The Office of the General Counsel is one product of the legislative reforms of the 1947 Taft-Hartley Bill.[10] Prior to 1947 the NLRB was responsible for initiating, investigating, prosecuting, and adjudicating unfair labor practice violations.[11] To achieve a separation of powers, the legislature created the position of General Counsel, with "final authority, on behalf of the Board" to investigate and issue complaints and to prosecute those complaints before the Board.[12] The main headquarters of the Office are in Washington, D.C. and there are thirty-one regional

Regional Director, Loomis described his inability to obtain employment, meet his bills, or retain his home. He expressed outrage that almost seven months later, despite several allegations of union-motivated firings, "statements from management officials regarding [the] program to get rid of certain people and [his] testimony, . . . to this date they have not issued a complaint, scheduled a hearing, or done anything." *Oversight Hearings on the NLRB, H.R. 8110 etc., Before the Subcomm. on Labor-Mgt. Rel. of the House Co. on Education and Labor*, 94th Cong., 1st Sess. 337-38 (1976) [hereinafter *Oversight Hearings on NLRB*]; McConville, *NLRB Down South—How 7,041 Got Fired*, THE NATION, Oct. 25, 1975, at 392-94.

Unions also express dissatisfaction with the process. Roland Davis who represents the Retail Clerks Union stated that

> The importance of the decision to issue complaints cannot be overstated. . . . If the General Counsel refuses to issue complaint on a meritorious case, there is absolutely no relief that a union can obtain. . . . There must be some way to permit charging parties to have a more effective appeal than appeal to the General Counsel's office when the Gen. Counsel's office sustains the Regional Office in over ninety percent of the cases.

Oversight Hearings on NLRB, *supra* at 317-18.

Employers are also pushing for reforms.

> A poll taken among chamber of commerce and trade associations . . . gave top priority to the proposal to strip the NLRB of power to rule when an employer has committed an unfair labor practice as defined in the labor law.
>
> Some 28 per cent of the votes put that change in the No. 1 position.

How Business Hopes to Change the Nation's Labor Laws, 66 U.S. NEWS & WORLD REP., June 16, 1969, at 68-69.

9. *See* notes 156-93 and accompanying text *infra*.

10. *See* International Union of Elec. Workers v. NLRB, 289 F.2d 757 (D.C. Cir. 1960), for a detailed history of the establishment of the Office of the General Counsel.

11. Haleston Drug Stores v. NLRB, 187 F.2d 418 (9th Cir. 1951); *accord*, NLRB v. Lewis, 249 F.2d 832 (9th Cir. 1957); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.07 (1958) [hereinafter cited as DAVIS (1958 Treatise)].

12. National Labor Relations Act § 3(d), 29 U.S.C. § 153(d) (1970).

offices nationwide in which charges are filed and investigated.[13] A regional director has the authority to negotiate settlements, issue complaints, advise parties to withdraw, and dismiss charges.[14] This dismissal may be appealed to the Office of Appeals in Washington, subject to final approval by the General Counsel.[15] After a final decision by the Counsel, there is no judicial review of his refusal to prosecute.[16]

While the number of complaints issued varies with the individual General Counsel, the office has never attempted to prosecute every charge.[17] Since 1950, the NLRB has issued standards indicating the categories of cases suitable for consideration.[18] Applying these guidelines and strict evidentiary rules,[19] the General Counsel's Office serves as a screening device to limit the number of charges that reach the complaint stage.[20] For example, 31,253 unfair labor practice charges were filed in fiscal year 1975 and 9,169 (30.2 percent) were judged meritorious.[21] Only 3,983 of these charges resulted in the issuance of a complaint.[22] The majority were adjusted or settled, usually without the participation of the charging party.[23] Thus, only 12.7 percent of the original number were litigated.

B. History of the Unreviewable Discretion of the General Counsel

When Congress establishes an administrative agency to enforce federal laws, there is a general presumption in favor of judicial review of that agency's actions unless unreviewability is a part of the statutory scheme.[24] Nowhere in the NLRA is there a provision prohibiting judicial

13. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.08, at 194 (2d ed. 1970) [hereinafter cited as DAVIS (1970 Treatise)].

14. *Id.* "If investigation reveals that there has been no violation of the National Labor Relations Act or the evidence is insufficient to substantiate the charge, the regional director recommends withdrawal of the charge by the person who filed." 29 C.F.R. § 101.5 (1973). If the complaining party does not withdraw upon request, the Regional Director dismisses the charges. 29 C.F.R. § 101.6 (1973). *See* Morris, *supra* note 7, at 483.

15. DAVIS (1970 Treatise), *supra* note 13, § 4.08 at 194.95. Nevertheless, initial determinations by regional directors are overturned in only 7 to 12% of the appeals. Nash, *Labor Law Practice in the NLRB General Counsel's Office* in LAB. LAW DEV. 1976, 123, 137 (Southwest Legal Foundation).

16. *E.g.*, Braden v. Herman, 468 F.2d 592 (8th Cir. 1972); Mayer v. Ardman, 391 F.2d 889 (6th Cir. 1968); Wellington Mill Div., West Point Mfg. Co. v. NLRB, 330 F.2d 579 (4th Cir. 1964); Retail Employees Local 954 v. Rothman, 298 F.2d 330 (D.C. Cir. 1962); NLRB v. Lewis, 249 F.2d 832 (9th Cir. 1957); Hourihan v. NLRB, 201 F.2d 187 (D.C. Cir 1952).

17. Haleston Drug Store v. NLRB, 187 F.2d 418, 422 n.5 (9th Cir. 1951).

18. DAVIS (1958 Treatise), *supra* note 11, § 4.07 at 258.

19. The General Counsel requires evidence tantamount to a prima facie case. *See* Bartosic, *supra* note 7.

20. Bartosic, *supra* note 7, at 653.

21. 40 NLRB ANN. REP. 9-11 (1975). Therefore 69.8% of the charges filed were dismissed without any right for the charging party to appeal.

22. *Id.* at 12.

23. *Id.* at 5.

24. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967); *accord*, Data Processing Serv. v. Camp, 397 U.S. 150, 157 (1970).

review of the General Counsel's actions;[25] yet, the courts, relying on the public purpose of the Act, have declined to recognize the right of individuals to review. If the purpose of the agency is protection of the public, then unreviewability can be justified because a private party would have no recognized right to have his claim adjudicated or remedied.

This judicial interpretation of the Act was propounded as early as 1940, seven years before the position of General Counsel was created, when the Supreme Court refused to recognize the right of a private party to enforce an NLRB order.[26] The Court explained that "[t]he Board as a public agency acting in the public interest, not any private [individual] . . . is chosen as the instrument to assure protection" against unfair labor practices.[27] One year later in *Jacobsen v. NLRB*,[28] the Third Circuit held that the Board has absolute discretion to decide how to proceed. The court of appeals stated in dictum that

> the Board does not have to cause a complaint to be issued . . . or proceed to prohibit any unfair labor practices complained of. The course to be pursued rests in the sound discretion of the Board . . . . That discretion is not a legal discretion at least insofar that upon the abuse of it the several circuit courts of appeals might compel the Board to issue a complaint.[29]

These two decisions established the two major principles relied upon by judges to justify unreviewability—public purpose of the Act and deference to administrative discretion. When the power to prosecute was transferred to the General Counsel by the Taft-Hartley Act, the courts observed that neither the language granting the power to issue complaints[30] nor the intent of Congress to redress public grievances was changed.[31] The implication that Congress approved of judicial absention lent further support to the doctrine of unreviewability, and today the precedent is virtually unassailable.[32]

Suits challenging the finality of the General Counsel's decisions

25. Saez v. Goslee, 463 F.2d 214, 215 (1st Cir. 1972). *See* note 3, *infra*.

26. Amalgamated Util. Workers v. Edison Co., 309 U.S. 261 (1940).

27. *Id.* at 265.

28. 120 F.2d 96 (3d Cir. 1941).

29. *Id.* at 100.

30. Haleston Drug Stores v. NLRB, 187 F.2d 418 (9th Cir. 1951); Lincourt v. NLRB, 170 F.2d 307 (1st Cir. 1948).

31. There is no doubt that Congress intended to make the general counsel's decision unreviewable by the Board. President Truman recognized this in his veto message, pointing out that the general counsel 'might usurp the Board's responsibility for establishing policy under the act'; and numerous Senators and Representatives criticized the creation of a 'labor czar.'

International Union of Elec. Workers v. NLRB, 289 F.2d 757, 761 (D.C. Cir. 1960) (footnotes omitted).

32. [W]hile there is no provision in the Act explicitly prohibiting judicial review . . . , it must be concluded that judicial abstention has been fully acquiesced in by Congress. Indeed, in the face of overwhelming authority in favor of nonreviewability, the situation seems paradigmatic of one which is 'committed to agency discretion' under section 10 of the Administrative Procedures Act.

Saez v. Goslee, 463 F.2d 214, 215 (1st Cir. 1972).

have consistently been unsuccessful. The NLRA grants parties the right to appeal from a "final order" of the Board.[33] The courts have distinguished, however, between a final order of the NLRB and the General Counsel's action in refusing to issue a complaint. Final orders consist of actions taken by the Board either dismissing a complaint issued by the Counsel or ordering a remedy after a decision.[34] A decision of Counsel not to prosecute is an administrative determination with insufficient formality to constitute a final order "within the meaning of the Act."[35] It also follows that after dismissal of charges by Counsel, a disappointed party cannot obtain a mandatory injunction compelling the Board to issue a final order on matters in which no complaint was issued.[36] Nor can the Board be forced to issue a complaint on its own or order the General Counsel to do so.[37] Dismissal of charges by Counsel has survived attacks alleging arbitrary and capricious action,[38] denial of due process, [39] and failure to investigate thoroughly.[40]

Although several decisions suggest that in extreme situations judicial review of Counsel action may be appropriate,[41] never has a judge ordered

33. National Labor Relations Act, § 10, U.S.C. § 160(f) (1970).

34. AFL v. NLRB, 308 U.S. 401 (1940).

35. Lincourt v. NLRB, 170 F.2d 307 (1948); *accord* United Elec. Contractors Ass'n v. Ardman, 258 F. Supp. 758 (S.D.N.Y. 1965).

36. NLRB v. Swift & Co., 233 F.2d 226 (8th Cir. 1956); Hourihan v. NLRB, 201 F.2d 187 (D.C. Cir. 1952).

37. United Elec. Contractors Ass'n v. Ardman, 258 F. Supp. 758 (S.D.N.Y. 1965), *aff'd*, 366 F.2d 777 (2d Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967).

38. *E.g.*, Retail Employees Local 954 v. Rothman, 298 F.2d 330 (D.C. Cir. 1962); Hourihan v. NLRB, 201 F.2d 187 (D.C. Cir. 1952). In contrast to the absolute unreviewability of the General Counsel's authority, the Board's decisions in representation cases (an administrative determination normally not subject to review) may be attacked in two exceptional situations: if there is a claim of denial of constitutional rights, Fay v. Douds, 172 F.2d 720 (2d Cir. 1949), or the Board has proceeded in direct violation of the statute, Leedom v. Kyne, 358 U.S. 184 (1958). On a few occasions these exceptions have been utilized to overturn erroneous Board decisions, *e.g.*, McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963), but the exceptions have never been successfully applied to the General Counsel as well. United Elec. Contractors Ass'n v. Ardman, 258 F. Supp. 758, 761 (S.D.N.Y. 1965).

39. In Saez v. Goslee, 463 F.2d 214 (1st Cir. 1972) the court rejected a discharged employee's request to compel a hearing prior to final dismissal on the following three grounds: (1) there is no "entitlement" to have an unfair labor practice complaint issue, (2) the interest he was seeking to protect was not "essential to his continued existence," and (3) the Act protected public, not private, rights. *Id.* at 215. The right to have an unfair labor practice litigated was not as absolute as a welfare recipient's statutory entitlement to benefits as in Goldberg v. Kelly, 397 U.S. 250 (1970). Citing *Saez*, the Eighth Circuit Court of Appeals dismissed a due process argument on similar grounds, noting the limited resources of the Board and the possibility of increased delay. Braden v. Herman, 468 F.2d 592, 593 (8th Cir. 1972).

40. In Mayer v. Ardman, 391 F.2d 889 (6th Cir. 1968), the plaintiff sought an injunction requiring the General Counsel to merely investigate a filed claim, not to necessarily file a complaint. The court rejected this request, stating that "it is clear that despite his protestations otherwise, plaintiff is in effect asking this court to tell the General Counsel to perform an act which he in his discretion has determined not to do, or which he has done to his own satisfaction." *Id.* at 891. "It is well settled that the National Labor Relations Act precludes District Court review of the manner in which the General Counsel . . . investigates . . . and determines whether to issue a complaint." *Id.* at 889 (citing Dunn v. Retail Clerks Ass'n, 307 F.2d 285 (6th Cir. 1962).

41. "The courts should not be asked to take over the work of the General Counsel's

General Counsel to issue a complaint.[42] Even the Supreme Court, while not expressly ruling on the issue,[43] recited in dictum that "the Board's General Counsel has unreviewable discretion to institute an unfair labor complaint."[44] Any reservation that the judiciary may feel regarding the advisibility of resting broad powers in one person[45] have been overcome by the doctrines of public right[46] and respect for administrative discretion.

III. Policy Considerations

A. *Justification for Unreviewability*

Those in favor of retaining the position of General Counsel in its present form cite the doctrine of "public right," the system of checks that is already a part of NLRB procedure, and the increased delay and formality that would result from additional court review.

1. Doctrine of Public Right.—The purpose of the Labor Management Relations Act, as announced in the preamble and construed by case law, is primarily protection of the public "to promote the free flow of commerce, . . . [and] to provide orderly and peaceful procedures" for dealing with interference, to proscribe practices "inimical to the general welfare, and to protect the rights of the public."[47] In *Amalgamated Utility Workers v. Edison Co.*,[48] the Supreme Court, interpreting this language, declared that the rights of the public are paramount in an unfair labor practice adjudication.[49] This view came to be known as the doctrine of "public right."

The Court used several avenues to reach this conclusion. First, the Court conceded to Congress the right to proscribe certain practices and to vest the Board with exclusive authority to prevent them.[50] The underlying congressional intent in vesting exclusive authority in the Board was to "dispel the confusion resulting from dispersion of authority" and to

Office, or to scrutinize his decisions in matters of the present kind, except perhaps in the most extreme situations." Retail Employees Local 954 v. Rothman, 298 F.2d 330, 332 (D.C. Cir. 1962); Hourihan v. NLRB, 201 F.2d 187 (D.C. Cir. 1952).

42. In Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir. 1964), after the General Counsel had issued a complaint, he was ordered to amend. The court in Council of Laborers Local 1184 v. Ardman, 318 F. Supp. 633 (C.D. Cal. 1970), ruled that the General Counsel's decision as to the running of the statute of limitations was erroneous, but emphasized that initiation of proceedings was entirely within his discretion. "If, after considering the merits of the plaintiff's charges, [General Counsel Ardman] concludes that no complaint should issue, no judicial review of [his] determination may be had." *Id.* at 636.

43. Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 205 n.2 (1970) (Douglas, J., dissenting).

44. Vaca v. Sipes, 386 U.S. 171, 182 (1967).

45. *See* note 85 and accompanying text *infra*.

46. *See* notes 47-56 and accompanying text *infra*.

47. Labor Management Relations Act, § 1, 29 U.S.C. § 141 (1970).

48. 309 U.S. 261 (1940).

49. *See* notes 26-27 and accompanying text *supra*.

50. When analyzed by the Court, each procedure created by the statute supported the conclusion that the Board was intended to possess exclusive authority over every aspect of unfair labor practices. 309 U.S. at 264-66.

establish a single body to develop a national labor policy.[51] Private actions could result in conflicting interpretations when uniformity and predictability on a national scale were the goals. Congressional reports that indicated that no private cause of action was contemplated were cited as additional authority.[52] Finally, the Court relied on testimony that the NLRB was analogous to the Federal Trade Commission, which did not recognize or vindicate private rights.[53]

The public right doctrine promulgated in *Amalgamated Utility Workers* was adopted by lower courts that considered challenges to the dismissal of complaints.[54] Consequently, case law maintains that the Act does not confer private rights[55] and an injured individual has no independent right to have his claim adjudicated if, in the judgment of the General Counsel, litigation would not advance the public good. The agency, not the judicial branch, has been given the task of deciding whether the policies of the Act would be best served by dismissal, settlement, or adjudication,[56] and the courts will not interfere with this administrative determination.

2. Deference to Administrative Discretion and Procedure.—It was impossible for congressional lawmakers to anticipate every rule that would be necessary to cover the many variable fact situations that arise in labor law.[57] Therefore, Congress created the NLRA to formulate national labor policy according to the guidelines set out in the Act.[58] The courts recognized that to carry out this mandate the Board should have discretion to decline jurisdiction when adjudication would not promote the purposes of the Act.[59] The preliminary screening process of the Counsel's Office

51. SEN. REP. NO. 573, 74th Cong., 1st Sess., 15 (1935), *cited in* Amalgamated Util. Workers v. Edison Co., 309 U.S. 261, 267 (1940).

52. Both the House and Senate Reports reiterated that the purpose of the Act was to create a paramount authority to replace the confusing situation of overlapping jurisdictions. *Id.* at 267. "No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential." H.R. REP. NO. 972, 74th Cong., 1st Sess. 21 (1935).

53. 309 U.S. at 268. For an indication that the FTC's actions may be reviewable, *compare* Moog Indus. v. FTC, 335 U.S. 411 (1958) *with* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 28.00-2, at 609 (1976) [hereinafter cited as DAVIS (1976 Treatise)].

54. *E.g.*, Lincourt v. NLRB, 170 F.2d 307 (1948); United Elec. Contractor's Ass'n v. Ardman, 258 F. Supp. 758 (S.D.N.Y. 1965).

55. NLRB v. Olaa Sugar Co., 242 F.2d 714, 719 (9th Cir. 1957).

56. NLRB v. Fant Milling Co., 360 U.S. 301, 307 (1959).

> The policy of the Act, as construed in Amalgamated Util. Workers, requires that the Board be recognized as empowered to determine when the possibly slight merit of a charge is outweighed by the sure and speedy concessions, the industrial harmony restored, and the saving of Board resources which a settlement can achieve.

Local 282, International Brotherhood of Teamsters v. NLRB, 339 F.2d 795, 799 (2d Cir. 1964).

57. With respect to labor relations, the NLRB as an administrative agency is a necessity since it is impossible for Congress to anticipate and formulate in advance all the rules governing all the special circumstances and variable situations to which the broad general principles of labor policy must be applied.

Bartosic, *supra* note 7, at 659 (footnote omitted).

58. NLRB v. Olaa Sugar Co., 242 F.2d 714, 719 (9th Cir. 1957).

59. *Id.*

has enabled the Board to guide national labor policy by limiting litigation to important and controversial cases.[60]

Moreover, the screening process is structured to provide charging parties opportunity for separate and independent review of adverse decisions.[61] Dismissals by the General Counsel may be reconsidered by his office and, on occasion, reversed.[62] Despite his harsh criticism of unlimited prosecutorial discretion in general,[63] Professor Kenneth Davis has conceded that the system of precedents, internal review, and procedural protections within the General Counsel's Office is "deserving of admiration."[64] Advocates of the current system would therefore argue that court review is unnecessary.

3. Difficulties with Additional Review.—Any provision for additional review of the General Counsel's decisions could aggravate the greatest problem of the NLRB structure—delay in processing unfair labor practice complaints.[65] In fiscal year 1975 the median number of days from the filing of charges to the issuance of complaints was fifty-four days;[66] from the filing of a complaint to a final Board decision approximately 350 days elapsed,[67] however. Adding review of disputed dismissals to the other NLRB responsibilities would cause further delay in processing all labor disputes.[68] Moreover, it would increase the financial strain on the agency's limited resources by requiring the General Counsel to devote additional time and personnel to defend his decisions before the Board or the courts.[69] Another drawback is the sacrifice of informality

60. Congress intended one uniform body of law promulgated by the NLRB. This requires a selective process of choosing "test" cases in areas in which clear delineation of policy is necessary.

61. *See* note 15 and accompanying text *supra*.

62. Nash, *supra* note 15, at 138.

63. "Probably abuse of the prosecuting power by the regulatory agencies is ten or twenty times as common as abuse of the combined powers of adjudication and rule making." DAVIS (1970 Treatise), *supra* note 13, at 188. "Prosecutorial discretion is utterly uncontrolled—no procedural safeguards, no openness, no guiding standards, no findings or reasons, no system of precedents, no administrative review, no protection against politics or other extraneous influence and no judicial review." DAVIS (1976 Treatise), *supra* note 53, Preface at xi-xii.

64. DAVIS (1970 Treatise), *supra* note 13, at 196. "The system of the NLRB General Counsel contains the major elements of a full structuring of discretionary power—findings, reasons, precedents, checks through appeals and through internal supervision, and procedural protections." *Id.* at 195-96.

65. In her testimony before a House Subcommittee the NLRB Chairman, Betty Murphy, indicated her continuing concern with the increased processing time required for each case. She stated that she had created a committee to study procedures to reduce by thirty days the Board processing time. *Oversight Hearings on the NLRB*, *supra* note 8, at 6. For a summary of the committee recommendations, see *A Work Speedup at the NLRB*, BUS. WEEK, Nov. 8, 1976, at 96-103.

66. 40 NLRB ANN. REP. 13 (1975).

67. *Id.*

68. "[T]he primary principle of the Board is that it moves too slowly once it reaches the hearing stage of a matter. Requiring a trial-type hearing whenever a charging party disagrees with a decision of the Board officials would further complicate the Board's task." Braden v. Herman, 468 F.2d 592, 593 (8th Cir. 1972).

69. Comment, *Proposals for Modification of Unfair Labor Practice Procedures Under the NLRA*, 9 STAN. L. REV. 155, 159-60 (1956).

resulting from the pyramiding of one more formal procedure on top of the current system.[70] Emphasis is on the informality of the process,[71] which is a significant factor in encouraging "amiable and peaceful settlement of labor disputes."[72]

B. Case for Addition of a Private Cause of Action

1. Deprival of Relief for Aggrieved Employees.—While the arguments of public right and administrative efficiency continue to persuade the courts, the inequity and desirability of allowing independent actions are becoming evident. The congressional grant of exclusive jurisdiction over unfair labor practices has been interpreted to preempt state and federal jurisdiction in cases "arguably subject" to Board domain.[73] A number of exceptions have been carved out by statute,[74] the courts,[75] and the Labor Board,[76] but an employee whose case is not accepted by the General Counsel could be deprived of a forum.[77] For example, in *Amalgamated Association of Street Employees v. Lockridge*,[78] a state court judgment in favor of an employee awarding damages for discriminatory discharge was overturned by the Supreme Court.[79] Because his claim was subject to exclusive NLRA jurisdiction, the plaintiff's only avenue for relief was through that agency.[80] In his dissent, Justice Douglas graphically explained the hardships imposed on individuals by the preemption doctrine.

> From the viewpoint of an aggrieved employee, there is not a trace of equity in this long-drawn expensive remedy. If he musters the resources to exhaust the administrative remedy, the chances are that he too will be exhausted. . . . If the General Counsel refuses to act, then the employee is . . . barred from relief in either state or federal court. . . . When we tell a sole individual that his case is arguably within the jurisdiction of the Board, we in practical effect deny him any remedy.[81]

---

70. Saez v. Goslee, 463 F.2d 214 (1st Cir. 1972).

71. Nash, *supra* note 15, at 150.

72. Saez v. Goslee, 463 F.2d 214, 215 (1st Cir. 1972); *accord*, Branden v. Herman, 468 F.2d 592 (8th Cir. 1972).

73. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959). *See* Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435 (1970).

74. Labor Management Relations Act § 301, 29 U.S.C. § 185 (1970) (private cause of action for breach of collective bargaining agreement); § 303, 29 U.S.C. § 187 (private action for secondary boycott activity). *See* notes 142-50 and accompanying test *infra*.

75. Vaca v. Sipes, 386 U.S. 171 (1967) (duty of fair representation); *see* Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 309-32 (1971) (White, J., dissenting).

76. Spielberg Mfg. Co., 112 NLRB 1080 (1955) (arbitration).

77. Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971); Plumbers Local 100 v. Borden, 373 U.S. 690 (1963). *See* Comment, *State Jurisdiction Over Unfair Labor Practices*, 16 DEPAUL L. REV. 124, 137 (1967); Note, *Damages for Unfair Labor Practices*, 40 IND. L.J. 37, 38 (1964). *See* note 83 *infra*.

78. 403 U.S. 274 (1971).

79. *Id.*

80. *Id.* at 285-91.

81. *Id.* at 304-05 (Douglas, J., dissenting) (footnote and citation omitted).

Lack of basic discovery tools for gathering evidence to present a claim[82] and emphasis on public policy by the General Counsel's Office could result in the dismissal of meritorious charges that cannot be adjudicated elsewhere.[83] The absence of any form of judicial review can mean that a meritorious case will be denied even a hearing.

2. Possibility of Abuse.—Unchecked power to determine whether a claim will be litigated carries with it a potential for abuse.[84] The General Counsel possesses authority that, "if withheld or abused, can visit serious and irreparable harm upon those who, under the scheme of the NLRA, cannot obtain the help of judicial intervention."[85] Criticism is leveled at a system that institutionalizes the opportunity for arbitrary action, rather than the conduct of individuals occupying the office.[86]

The opinions expressed by experienced practitioners that seemingly meritorious cases were rejected without reason[87] are necessarily subjective. The decision whether to issue a complaint, however, is clearly one over which reasonable men may disagree[88] and, therefore, should not rest with one person. It is based on facts uncovered by a preliminary investigation unaided by discovery techniques.

The General Counsel is restricted by manpower and budgetary

82. Since the Federal Rules of Discovery do not apply to an NLRB proceeding, an individual may have difficulty in obtaining sufficient evidence to support a complaint. Barker, *Significant Developments in Damage Suits for Secondary Activity Under Section 303 of Taft-Hartley*, LAB. LAW DEV. 1975, 245, 257 (Southwest Legal Foundation).

83. A colleague of Lockridge, similarly dismissed from the Union, filed a formal charge with the Regional Director that was dismissed for insufficient evidence. He then instituted an action in state court and obtained an award for damages that was overturned on the basis of federal preemption. Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 280 n.3 (1971).

84. Representative John Erlenborn criticized the broad power of the General Counsel to act or not to act. "The choice is his, and that creates a danger that he may use it arbitrarily. . . .

I will say . . . that where the possibility exists for abuse, sooner or later, somebody's rights will be abused." 120 CONG. REC. E 4416 (Extensions of the remarks of Representative Erlenborn).

85. Dunn v. Retail Clerks Ass'n, 307 F.2d 285, 289 (6th Cir. 1962).

86. The defect in the system is in the office itself—in the absence of opportunity for review of the General Counsel's refusal to issue a complaint, and in the absence of a right of the charging party to process his own charge in lieu of action by the General Counsel.

Morris, *supra* note 7, at 483 (footnote omitted).

87. An attorney representing the Retail Clerks and other unions cited an example of mistaken judgment. An objection to an election and unfair labor practice charge were filed simultaneously and rejected by both the Regional Director and General Counsel. The election charge was appealed to the NLRB and the Board reversed both findings by the Counsel, saying the employer did commit an unfair labor practice. *Oversight Hearings on NLRB*, *supra* note 8, at 303; Morris, *supra* note 7, at 482. He went on to state that the Regional Director and General Counsel often refuse to "issue a complaint in close cases in spite of their many protestations otherwise." *Oversight Hearings on NLRB*, *supra* note 8, at 304.

88. Statement of Chamber of Commerce, *Oversight Hearings on the NLRA, H.R. 8110 etc., Before the Subcomm. on Labor-Mgt. Rel. of the House Comm. on Education and Labor*, 94th Cong., 2d Sess. 19 (1976).

constraints,[89] which necessarily limit the number of cases that can be prosecuted. As the number of charges filed continues to escalate, a greater percentage of borderline cases[90] will probably be dismissed and the possibility of further abuse similarly arises. Because of the strict evidentiary standards applied in accepting cases, the Counsel has been successful in over eighty percent of the suits that he finally prosecuted.[91]

Senator John Tower, a proponent of the addition of a private cause of action,[92] has expressed a common concern that the General Counsel should not be vested with such tremendous authority to influence national labor policy. "The General Counsel . . . has such absolute power, potentially capable of thwarting the aim of the entire statute regardless of the 'good faith' in which he engages in his activities. He can ignore court rulings by failing to prosecute a complaint—or even [B]oard decisions by the same negative process."[93] There are many who believe that sole discretion to prosecute creates a danger of selective processing.[94]

3. Recognition of Private Rights.—The NLRB was established in 1935 to promulgate a uniform body of substantive law that would strike a balance between the rights of employees to organize and employers to govern their enterprises.[95] It was necessary that the NLRB possess primary jurisdiction over unfair labor practice claims to achieve this uniformity,[96] but the Board could handle only a limited number of cases.[97] Ability to decline jurisdiction was a necessary tool for maintaining a workable case load and was justified by emphasizing the public purposes of the Act.[98] Private actions at that time would have created confusion by encouraging conflicting interpretations of the statute.[99] In the forty-two years following the creation of the NLRB, however, a body of decisional law has been developed that could now be applied by judges to remedy

89. Auto Workers v. Scofield, 382 U.S. 205, 219-20 n.15 (1965).

90. Morris, *supra* note 7, at 482.

91. Irving, *Current Developments in the Office of the General Counsel—Substantive, Procedural, Administrative,* LAB. LAW DEV. 1976, 67, 71 (Southwestern Legal Foundation).

92. 179 CONG. REC. 6975-76 (Remarks of Senator Tower).

93. *Id.* at 6975.

94. Comment, 9 STAN. L. REV. 155, *supra* note 69, at 160.

95. Comment, *State Jurisdiction Over Unfair Labor Practices*, 16 DE PAUL L. REV. 124, 125 (1967).

96. Congress has made it clear that the Act is to be solely enforced by the Board but not necessarily because it had its eye on the 'public' rather than the employee. In a field so untried it was considered wise to give the enforcing agency complete control of and responsibility for the formation of policy and for the intake of the material best fitted for that purpose. . . . Congress might . . . have allowed employees to sue in court. . . , but this would have developed in the crucial trial period rival systems of interpretation. . . . Initially this task [of developing standards] may be best performed by a small group capable of exhaustive and continuous discussion and decision. This means in turn a limited work load. Once a body of doctrine has been developed, jurisdiction could conceivably, if there were any strong reason for it, be placed on a nondiscretionary basis.

Jaffe, *The Public Right Dogma*, 59 HARV. L. REV. 720, 728 (1946) (footnotes omitted).

97. *Id.*

98. NLRB v. Olaa Sugar Co., 242 F.2d 714, 719 (9th Cir. 1957).

99. *See* note 96 *supra*.

private wrongs.[100] The earlier justifications are now archaic and can no longer justify the denial of private actions.

The NLRA is responsible for protecting the rights of employees to organize or to refrain from joining a union by preventing unfair labor practices.[101] This goal cannot be fully accomplished without the addition of a private cause of action. Other public agencies that protect individual or group interests have a private analogue that provides individual relief.[102] In fact, the NLRA is "almost alone in committing to the sole enforcement of a public agency a policy which is universally recognized as vindicating individual or group interests."[103] In recognizing the right of a charging or charged party to intervene in appellate court proceedings, the Supreme Court stated that the rhetoric of public interest should not be applied to exclude recognition of private rights.[104] Despite the public purposes of the Act, individual rights can be accommodated within the statutory scheme.[105] The remedies for violations are personal—cease and desist orders, reinstatement, back pay.[106] Those proposing an individual action assert that in almost every federal agency private suits are actually encouraged to supplement governmental prosecution efforts and to provide individual relief.[107]

IV. Federal Legislation Recognizing Private Actions

A. *Antitrust Acts*

Private suits abound in the area of antitrust litigation. The Sherman Act,[108] in addition to entrusting the United States Attorney General with prosecutory power,[109] authorizes private actions. Furthermore, section 4 of the Clayton Act[110] grants to any person "injured in his business or property by reason of anything forbidden in the antitrust laws" the right to proceed in federal district court and to recover treble damages.[111]

---

100. *See* notes 145-46 and accompanying text *infra*.

101. National Labor Relations Act §§ 1, 7, 29 U.S.C. §§ 151, 157 (1970).

102. For example, crimes prosecuted by United States and district attorneys have tort analogies that can constitute the basis for an action to redress private grievances. Jaffe, *supra* note 96, at 726-27. *See* notes 108-52 and accompanying text *infra*.

103. Jaffe, *supra* note 96, at 726.

104. The United States Supreme Court in Auto Workers v. Scofield, 382 U.S. 205 (1965), recognized that a party whose vital interests are affected by the act is entitled to intervene as a party in appellate proceedings.

> In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme. These cases have, to be sure, emphasized the 'public interest' factor. To employ the rhetoric of 'public interest,' however, is not to imply that the public right excludes recognition of parochial private interests.

Id. at 218.

105. *Id.*

106. National Labor Relations Act § 12, 29 U.S.C. § 162 (1970).

107. 119 CONG. REC. 6975 (Remarks of Senator Tower).

108. Sherman Antitrust Act §§ 1-7, 15 U.S.C. §§ 1-7 (1970).

109. *Id.* §4.

110. Clayton Antitrust Act §§ 1-17, 15 U.S.C. §§ 12-27 (1970).

111. *Id.* §15.

Although the ultimate purpose of the Act is to maintain a "free and competitive economy" for the protection of the public,[112] private actions are encouraged as an "ancillary force of private investigators" to aid in achieving this goal.[113] The Supreme Court expressly ruled that the remedies are intended to be "cumulative not mutually exclusive," proceeding simultaneously or independently of one another.[114] Federal judges have liberally construed section 4[115] to permit private actions because the civil action serves not only to redress private injuries,[116] but to complement government efforts.[117]

B. Securities and Exchange Act

The Securities and Exchange Act [118] established the Securities and Exchange Commission to enforce the Act or regulations in federal courts.[119] Section 16(b) explicitly grants to the issuer or owner of a security a right to recover profit from a short swing sale or purchase in a private suit.[120] Additionally, the Supreme Court held that a private right of action not explicitly granted by the statute could be implied from the language of the Act to effectuate congressional policy.[121]

In *J.I. Case v. Borak*, [122] the section granting federal courts exclusive jurisdiction[123] was interpreted to provide a private cause of action for violation of section 14(a), which bans proxy solicitation to protect investors.[124] The goal of protecting stockholders, the court concluded, implied the availability of judicial relief when necessary.[125] Private enforcement was welcomed as a supplement to the Commission's actions.[126]

---

112. Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957).

113. *In re* Pittsburgh & Lake Erie Ry. Co. Sec. & Antitrust Litigation, 387 F. Supp. 906, 908 (W.D. Pa. 1974). The private antitrust action is an important and effective method of combating unlawful and destructive business practices. Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957).

114. United States v. Borden Co., 347 U.S. 514, 518 (1954).

115. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); *accord*, Silvercup Bakers, Inc. v. Fink Baking Corp., 273 F. Supp. 159 (S.D.N.Y. 1967).

116. Lanier Business Prod. v. Graymar Co., 355 F. Supp. 524 (D. Md. 1973).

117. *In re* Pittsburgh & Lake Erie Ry. Co. Securities & Antitrust Litigation, 387 F. Supp. 906 (W.D. Pa. 1974).

118. Securities and Exchange Act of 1934 §§ 1-34, 15 U.S.C. §§ 78a to 78hh-1 (1971).

119. *Id.* § 78u(e), § 78aa.

120. *Id.* § 78p(b).

121. J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

122. *Id.*

123. 15 U.S.C. § 78aa (1970). Section 27 reads in pertinent part, "The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

124. (a) It shall be unlawful for any person. . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit . . . any proxy or consent or authorization in respect of any security . . . registered pursuant to section 12 of this title.

15 U.S.C. § 78n(a) (1970).

125. J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

126. Id. at 433. While the primary purpose of the SEA is to regulate and control the

Relying on this liberal Supreme Court interpretation of the Securities Act, the court of appeals in *Medical Committee for Human Rights v. SEC*[127] held that even dismissal of a petition by the Commission can be reviewed.[128] This action was sufficiently final to warrant judicial consideration, especially in view of the strong presumption in favor of judicial review of administrative actions.[129] Thus, under the SEA, unlike the NLRA, refusal to prosecute is a final action subject to court review.[130]

C. *Equal Employment Opportunities Act*

In 1972 the Equal Employment Opportunities Act [131] was amended to explicitly grant to individuals the right to proceed in a civil suit if the EEOC fails to prosecute a charge. Unless a conciliation agreement has been entered, the complaining party may file an action in federal court[132] if a complaint is dismissed or not acted upon within a specified time.[133]

These amendments codified a trend in the circuit courts that inferred a private right of action arising after dismissal of a charge.[134] Even prior to 1972 an EEOC finding that no reasonable cause existed to support a claim did not bar judicial review of the claim.[135] These cases generally relied on the absence of clear legislative intent to preclude review[136] and the presumption in favor of judicial review.[137] Reluctant to allow an administrative decision by the EEOC to prejudice the rights of an individual, one judge concluded "that the ultimate decision whether the claim is real or fanciful must be for the courts."[138]

---

market for securities to protect the national economy and credit, 15 U.S.C. § 78b (1970), it is also aimed at protecting individual investors. One purpose of the NLRA mandate is to protect the exercise by workers of freedom of association, 29 U.S.C. § 158 (1970). It is not Congress, but the courts that create exceptions allowing private actions. Jaffe, *supra* note 96, at 726. Just as the SEA mandate allows private relief, so should agrieved persons be granted this same right under the NLRA when the avenue of judicial relief is necessary to provide a remedy.

127. 432 F.2d 659 (D.C. Cir. 1970).

128. "Review limited to the task of correcting such legal defects is consistent with the Supreme Court's interpretation of the Securities Act in *J.I. Case Co. v. Borak*." *Id.* at 675.

129. *Id.* at 666, 675. *See* note 24 and accompanying text *supra*.

130. *Compare* Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970) *with* DAVIS (1976 Treatise), *supra* note 53, at 609.

131. 42 U.S.C. §§ 2000a to 2000e-15 (1970).

132. *Id.* The injured party has 90 days in which to act. In circumstances deemed reasonable, the judge may appoint an attorney and waive fees, costs, or security.

133. The EEOC has 180 days upon which to settle or dismiss. *Id.* § 2000e-5(e).

134. *E.g.*, Beverly v. Lone Star Lead Const. Corp., 437 F.2d 1136 (5th Cir. 1971); Johnson v. Seaboard Air Line Ry. Co., 405 F.2d 645 (4th Cir. 1968); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968).

135. Fekete v. U.S. Steel Corp., 424 F.2d 331, 335 (3d Cir. 1970).

136. *Id.* at 334; *see* Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969).

137. Fekete v. U.S. Steel Corp., 424 F.2d 331, 334 (3d Cir. 1970) (citing Association of Data Processing Service Org's, Inc. v. Camp, 397 U.S. 150 (1970)); Grimm v. Westinghouse Corp., 300 F. Supp. 984 (N.D. Cal. 1969). *See* note 24 and accompanying text *supra*.

138. Fekete v. U.S. Steel Corp., 424 F.2d 331, 336 (3d Cir. 1970).

D. Labor Acts

1. Fair Labor Standards Act.—Within the area of federal labor legislation, private employees may proceed in independent civil actions for the recovery of wages due under the Fair Labor Standards Act.[139] Section 16(b) provides an individual with the following three options: (1) suit may be initiated by the employee, (2) a class action on behalf of consenting employees may be maintained, and (3) the Secretary of Labor may, upon request, institute an action.[140] The right to proceed independently is terminated only if the Labor Secretary files a complaint.[141] This statutory scheme enables both the government and private sectors to work together to enforce wage and hour laws and permits the claimant to tailor procedure to fit the exigencies of his situation.

2. NLRA - Sections 301 and 303.—The NLRA also has two provisions authorizing individuals to proceed in a private action simultaneously with or independently of NLRB prosecution of unfair labor practice violations. Section 301 recognizes a private right of action for breach of a collective bargaining agreement[142] and section 303 recognizes a similar remedy for secondary boycott activity.[143] Under section 301 a suit for damages arising from violation of an existing employment contract may be brought in federal district court without respect to the amount in controversy or diversity.[144] The courts have shown no difficulty in upholding concurrent jurisdiction.[145] The Supreme Court pointed out that, on occasion, the Board has "declined to exercise jurisdiction to deal with unfair labor practices in circumstances where, in its judgment, federal labor policy would best be served by leaving the parties to other processes of the law."[146]

While section 301 generally entails application of contract law, section 303 requires application of labor principles.[147] Any party "injured in his business or property" by reason of secondary boycott activity may institute an action for damages in federal court.[148] The purpose of the provision is to confine labor disputes solely to the primary parties,[149] but it has been criticized for singling out labor organizations as the only parties who may be held liable for damages.[150] Commentators also find

139. 29 U.S.C §§ 201-219 (1970).
140. *Id.* § 216(b).
141. *Id.* Recovery includes unpaid wages, liquidated damages, cost of suit, and attorney fees.
142. 29 U.S.C. § 185 (1970).
143. *Id.* § 187.
144. *Id.* § 185.
145. *E.g.*, Boy's Market Inc., v. Retail Clerks Local 770, 398 U.S. 235 (1970); Eazor Express, Inc. v. International Brotherhood of Teamsters, 376 F. Supp. 841 (1974).
146. Smith v. Evening News Ass'n, 371 U.S. 195, 198 n.6 (1962).
147. 29 U.S.C § 158(b) (4) (1970).
148. *Id.* §187.
149. Gilmour v. Wood Lathers Local 74, 223 F. Supp. 236 (N.D. I11. 1963).
150. Section 303 is "unilateral, and an anathema to labor organizations, since its

fault with the allowance of independent private suits because they open the possibility that NLRB decisions might be res judicata in a subsequent private damage action. Selective application of res judicata may prevent needless, expensive relitigation of issues and avoid the possibility of inconsistent results,[151] but can discourage settlement of cases.[152] A claimant is unlikely to settle a dispute before the Board when he knows that a definitive administrative decision can establish his liability in a subsequent suit.

This survey illustrates congressional and judicial recognition of the usefulness of the private action in supplementing government enforcement of the law. An individual cause of action has often been implied by judicial construction when no other relief is available.[153] Despite an overwhelming NLRB case load and the plight of individuals without recourse to the courts, a private cause of action after dismissal of complaints has yet to be recognized.[154] The courts have abdicated the responsibility[155] to protect private rights, and Congress is now studying two proposals to remedy resultant injustice.

V. Suggested Amendments

Spurred by the lobbying efforts of both labor and management,[156] the House Subcommittee on Labor and Management Relations has considered proposals that would reduce or completely repeal the exclusive power of the General Counsel to prosecute unfair labor practice charges. One bill proposed expansion of section 303 coverage[157] and a second recommended transfer of unfair labor practice cases to the district courts.[158]

---

provisions apply only to labor organizations and only they may be subject to an award of damages. In this respect, it represents an imbalance in the statute . . . ." Barker, *supra* note 82, at 245.

151. Painters District Counsel, No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969); 67 MICH. L. REV. 824 (1969); *see* note 170 *infra*.

152. The application of res judicata could discourage settlement of claims before the NLRB by creating a situation in which the charging party, by resisting settlement, may have his case litigated by the General Counsel, a final order entered, and summary judgment in a court action. Settlement, especially with no admission, would necessitate a full court trial on the merits at the individual's expense prior to determination of damages. Barker, *supra* note 82, at 258.

153. The power [given to courts] to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.

Deckert v. Independence Corp., 311 U.S. 282, 288 (1940).

154. After dismissal of an employment discrimination charge by the EEOC, an individual has the right to a final court determination. *See* notes 131-138 and accompanying text *supra*. After dismissal of a union discrimination charge, there is no right to review. *See* note 80 and accompanying text *supra*.

155. Saez v. Goslee, 463 F.2d 214 (1st Cir. 1972). *See* note 25 and accompanying text *supra*.

156. *Pushing to Rewrite Labor Relations Act*, BUS. WEEK, Oct. 11, 1969, at 50; *Labor-Business Sees a Way to Change NLRB*, BUS. WEEK, Nov. 29, 1969, at 102.

157. H.R. 8110, 94th Cong., 2d Sess. (1976).

158. H.R. 9214, 94th Cong., 1st Sess. (1975).

In 1976 hearings were held on H.R. 8110,[159] which amended section 303 to include suits for infractions of section 8(a) (3)[160] and 8(b) (2).[161] Any discrimination on the basis or union activity would have made the union of the employer liable for treble damages, cost of suit and attorney's fees.[162] A final NLRB decree was to be prima facie evidence in a later suit.[163]

The proposed legislation was supported by organized labor[164] because it was intended to discourage use of unfair labor practices to hinder and delay unionization.[165] Treble damages were to make the consequences of delay more expensive.[166] In addition, recovery of damages were to be more adequate compensation for losses actually sustained than the NLRB remedies of back pay and reinstatement.[167] Finally, treble

159. H.R. 8110 read in part,

> (c) Any person who shall suffer financial injury by reason of any violation of sections 8(a)(3) or 8(b)(2) may sue therefore in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. A final judgment or decree heretofore rendered by the Board to the effect that a defendant has violated said sections 8(a)(3) or 8(b)(2) shall be prima facie evidence against such defendant in any action or proceeding brought by him.

160. 29 U.S.C § 158(a)(3) (1970) (employer encouraging or discouraging union membership).

161. *Id.* at § 158(b)(2) (union causing or attempting to cause an employer to discriminate).

162. *See* note 159 *supra*.

163. This provision was similar to section 4 of the Clayton Act. *See* notes 110-11 and accompanying text *supra*.

164. *A Work Speedup at the NLRB*, BUS. WEEK, Nov. 8, 1976, at 103.

165. Louis Paulton, counsel for the International Association of Machinists and Aerospace Workers noted,

> This relief is not only necessary but highly desirable for it will forestall the actions by employers in deliberately violating the Labor-Management Relations Act.
>
> I cannot overemphasize that it is time that Congress put teeth into the enforcement of the Labor-Management Relations Act. At the present time an employer or a union can violate the act and in most instances receive a slap on the wrist for committing such violation. For example, an employer can deliberately refuse to bargain with the union and again after 2 or 3 years of litigation the slap on the wrist takes place by requiring the employer to then bargain with the union. In the meantime the employees have lost the fruits of collective bargaining. Their agent has been substantially weakened. They have been deprived of wage increases, fringe benefits and other benefits of a collective bargaining agreement, and until a contract has been signed, pay nothing. The employer or the union who violates the act should be required to pay damages to the employees because of such violation. The Congress should without further ado provide adequate remedies compensatory and/or punitive for violations of the Labor-Management Relations Act. Such remedies should adequately provide payment to the employees for violations of a Federal law.

Oversight Hearings on the NLRA, *supra* note 88, at 457.

166. "Back pay awards are tax deductible as a legitimate business expense. And if a fired employee is able to find work before being reinstated, his earnings during the period are subtracted from what the company must pay him." McConville, *supra* note 8, at 393.

167. Studies of the reinstatement remedy have concluded that it is essentially useless as a remedial device. The number of persons accepting reinstatement decreases as time passes so that only about 5% accept if the period is over six months. The reasons for declining are, in order of frequency, fear of company retaliation, better job offers, and immediate need for back pay. Aspin, *Job Reinstatement Under Section 8(a)(3) of the NLRA*, 94 MON. LAB. REV. 57, March 1971; Stephens & Chaney, *A Study of the Reinstatement Remedy under the National Labor Relations Act*, 25 LAB. LAW J. 31 (1974).

damages could have provided an incentive for individuals to aid the government in enforcement of the NLRA.[168]

Critics of H.R. 8110 argued that making a final order prima facie evidence could encourage delay of trial pending the Board decision[169] when prompt resolution of disputes is the statutory goal. The possibility of inconsistent decisions from subsequent trials could increase confusion in the labor area.[170] Another serious criticism was the change of the purpose of the statute from remedial to punitive.[171]

Recognizing these limitations, Mr. Thompson, Chairman of the Committee on Education and Labor, has introduced the Labor Reform Act of 1977, H.R. 8410.[172] Instead of adding a private cause of action,

168. *Cf.* Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957) (purpose of private antitrust action).

169. [T]he lawyers will have a field day arguing whether the Board procedure ought to be stayed pending court suit or whether the court suit ought to be stayed pending the Board proceeding. The potential for new delay ought to make the triple damage penalty well worthwhile for the deliberate offender.

Statement of Edward B. Miller, Esq. (former NLRB chairman), ***Oversight Hearings on NLRB***, *supra* note 8, at 248. This is similar to the res judicata argument presented against currently existing private actions. *See* notes 151-52 and accompanying text *supra*.

170. [I]nconsistent findings are obviously quite possible under the 'completely independent' doctrine and, indeed, have already occurred. Allowing different tribunals to find that the same activities are both legal and illegal not only is irrational, but also promotes confusion in a very sensitive and complex area of labor relations. Total uniformity could not be achieved, but estoppel could be applied in the majority of cases, and this would markedly decrease the opportunities for conflicts to arise.

67 MICH. L. REV. 824, 837 (1969) (footnotes omitted). ***But see*** Barker, *supra* note 82.

171. The avowed object of the amendment's supporters is to punish companies who use delays inherent in the system to their advantage. While they are unlikely to deter conscious wrongdoers, the provisions may punish unjustly the employer who honestly, but mistakenly, attempts to discipline an employee. *See* statement of Edward B. Miller, Esq. (former NLRB chairman), ***Oversight Hearings on NLRB***, *supra* note 8, at 248. Many unfair labor practice violations are close cases based on circumstantial evidence; indiscriminate awards of punitive damages create a harshness inconsistent with the conciliatory purposes of the Act. *See* Republic Steel Corp. v. NLRB, 311 U.S. 7, 10-11 (1940); *accord*, Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir. 1964). Unlike the Clayton Act, which imposes criminal sanctions, *see* notes 110-11 and accompanying text *supra*, the NLRA remedies have always been remedial.

172. H.R. 8410, 95th Cong., 1st Sess. (1977). H.R. 8410 reads in part,

(3) In a case in which the Board determines that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8 deprives an employee of employment while employees in a bargaining unit which includes that employee are seeking representation by a labor organization or during the period after a labor organization has first been recognized as a representative defined in subsection (a) of section 9 in such unit until the first collective-bargaining contract is entered into between the employer and the representative, the measure of backpay for the period until a valid offer of reinstatement is made shall be double the employee's wage rate at the time of the unfair labor practice. In a case in which the Board determines that an unlawful refusal to bargain prior to the entry into the first collective-bargaining contract between the employer and the representative selected or designated by a majority of the employees in the bargaining unit has by a majority of the employees in the bargaining unit has taken place, the Board may award to the employees in that unit compensation for the delay in bargaining caused by the unfair labor practice which shall be measured by the difference between (i) the wages and other benefits received by such employees during the period of delay, and (ii) the wages and fringe benefits such employees were receiving at the time of the unfair labor practice multiplied by the percentage change in wages and other benefits stated in the Bureau of Labor Statistics' average wage and benefit settlements, quarterly report of major collective-bargaining settlements, for the quarter in which the

the Reform Act expands the remedies available to the NLRB for violations of sections 8(a) (3) and 8(b) (2).[173] The Board may award double the employee's wages for an unlawful firing.[174] To remedy an unlawful refusal to bargain, the Board may award the difference between wages and benefits received by the employees and the same compensation multiplied by the average percentage increase in wages for that quarter.[175]

Passage of H.R. 8410 would not correct the unfortunate situation in which the employee must place all his hopes for obtaining relief for union discrimination in the hands of the General Counsel.[176] While it seems to be aimed exclusively at employer misbehavior, it is not as punitive as the proposed H.R. 8110.[177] Employees will not receive compensation for all the damages suffered that a private right of action would afford.

A second proposal, the Modified District Court Plan, would amend the Act to allow an injured party to file a complaint in the federal district court if the General Counsel has refused to proceed upon request.[178] Upon a finding of reasonable cause, the court can litigate the issue of

---

delay began. If the Secretary of Labor certifies to the Board that the Bureau has, subsequent to the effective date of the Labor Reform Act of 1977, instituted regular issuance of a statistical compilation of bargaining settlements which the Secretary determines would better effectuate the purposes of this subsection than the compilation specified herein, the Board shall, in administering this subsection, use the compilation certified by the Secretary.

The Labor Reform Act of 1977 passed the House on October 6, 1977 by a 257-163 vote. It will be considered by the Senate early in 1978. *House Hands Labor Major Legislative Victory,* HUMAN EVENTS, Oct. 22, 1977 at 1,6.

Earlier in the session, Chairman Thompson introduced H.R. 77, 95th Cong., 1st Sess. (1976), a stronger bill than H.R. 8410. The earlier bill included treble damages for employer infractions to be awarded to unions and employees. William B. Gould, professor of law at Stanford University, noted the strengths and weaknesses of the bill as follows:

> [I]t seems logical that these remedies, which are available in the antitrust and equal employment opportunity fields, should be part of the board's arsenal under the NLRA, although it may be that treble damages should be awarded only in the case of repeated wrongdoing.
>
> The real question is whether the remedies will work. In the case of treble damages, it is quite possible that a number of managements will still find it possible to engage in unlawful behavior despite the additional expense. And since the Labor Reform Act [H.R. 77] does not provide for the revocation of *existing* government contracts, the sanction may not be as awesome as is envisioned. (Incidently the record of law enforcement with respect to equal opportunity, where these penalties are available, is not particularly good.)

Gould, *Prospects for Labor-Law Reform*, THE NATION, April 16, 1977, at 466-68; *see Labor's New Southern Strategy*, BUSINESS WEEK, Feb. 7, 1977, at 28-29; *Storm Brews Over Union Demands* on Congress, U.S. NEWS & WORLD REP., March 7, 1977, at 88-89; *Labor Reform Faces Potent Opposition*, BUSINESS WEEK, May 2, 1977, at 34-36. The Carter Administration, however, has thrown its support behind the more moderate H.R. 8410. *Labor: Carter's Detente*, NEWSWEEK, July 25, 1977, at 64-67.

173. *See* note 172 *supra*.
174. *See* note 172 *supra*.
175. *See* note 172 *supra*.
176. *See* notes 78-81 and accompanying text *supra*.
177. *See* note 171 *supra*.
178. Among other changes H.R. 9214 amends section 10 as follows:

> (c)(1) Whenever a charge is filed with the General Counsel of the Board, he shall promptly serve a copy of the charge upon the person against whom the charge is made. Within a reasonable time thereafter, he shall file a complaint with the appropriate court [federal district courts] . . . , unless he determines that the charge is without basis in law or fact, in which case he shall promptly notify the

substantive rights.[179] Furthermore, the adjudication of all unfair labor practices would be transferred to the court system,[180] leaving the Board jurisdiction over regulatory functions only.[181] As before, all claims must first be filed with the General Counsel, who then either files the complaint with the federal court or dismisses it.

Aimed at repealing the sole authority of the General Counsel to act, the proposed amendment would allow vindication of private wrongs without creating a multiplicity of suits or aggravating a controversy over the use of res judicata.[182] Dual review at the initial stage of proceedings, with the additional evidence uncovered through discovery, would insure that valid claims would be considered and frivolous ones rejected.[183]

Shifting NLRB membership has created difficulties in maintaining a consistent and predictable national labor policy.[184] On many occasions the Board has reversed itself or overruled established precedent.[185] Exclusive federal jurisdiction would encourage uniformity by stare decisis, at least within each circuit, and decrease the potential influence of politics on labor policy.[186] It is evident from their handling of the FLSA and

---

parties of such determination. Within ninety days after receiving such notice, the charging party may file a complaint in any [appropriate] court . . . having jurisdiction . . . and, if the court determines that there is reasonable cause to proceed, prosecute the complaint on his own initiative.

This bill was introduced in 1975, referred to committee, but not reported out during the 94th Session.

179. *See* note 178 *supra*.

180. *See* note 178 *supra*.

181. The House sponsor, Congressman John Erlenborn, noted that the NLRB is better suited to the regulatory function, i.e., certification of bargaining units and elections rather than adjudication. Address by Congressman Erlenborn, *supra* note 6, at 225; *Oversight Hearings on the NLRA*, *supra* note 88, at 19.

182. The controversy over res judicata and inconsistent decisions would not be a problem. *See* notes 140-42 *supra*.

183. *See* Statement by the Chamber of Commerce, *Oversight Hearings on NLRA*, *supra* note 88, at 16.

184. New law is made every time a new administration is elected, contributing, I might add, to a rush on unfair labor practice complaints being filed, either because the law is uncertain and in a state of flux with the result that the complaint is filed because the charging party does not know what the law is, or simply because the charging party hopes and with reasonable expectations, no doubt, that previous board decisions will be reversed. The result is that Federal policy is made not by the rule of law but by the rule of men and that the Board continually faces a backlog of cases causing enormous delay in the administration of justice.

119 CONG. REC. 6975 (1974) (remarks of Senator Tower).

185. *E.g.*, Lobue Bros., 109 NLRB 1182 (1954) was reversed in 1967 by DIT-MCO, 16 NLRB 1019. The Supreme Court in 1974 reversed this decision. NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973).

186. The truth is that the present system contributes to a fundamental lack of uniformity. In those instances, and they are not infrequent, when a federal appellate court disagrees with the Board, there is no prompt compliance. Instead, the Board continues to apply its own doctrine or interpretation, even within the geographical jurisdiction of that circuit, until overruled by the Supreme Court. Thus, if a party has enough money to pay for an appeal to the court, he will be governed by the appellate court's interpretation. On the other hand, those in the same circuit who lack the funds are subject to the Board's interpretation on the same issue. Inevitably, this situation gives rise to circuit shopping, a practice in which litigants—again, if they have the means—will take their appeals to that circuit which is most favorable to them. The Act currently permits that practice. The District Court Plan would at least make for uniformity within each circuit, regardless of a litigant's ability to pay for an appeal.

Address by Congressman Erlenborn, *supra* note 6, at 224.

section 303 and from the NLRB's occasional decisions to defer cases to the courts when there is concurrent jurisdiction[187] that federal judges are capable of understanding and applying the Act.

There are, however, five equally compelling arguments against the transfer of unfair labor practice adjudication into the federal court system. First, the proposal, although favored by management, which claims that the current NLRA application is labor-oriented,[188] is opposed by those who fear that the courts may be biased toward employers.[189] Second, since no changes are proposed in the remedies applicable to the Act,[190] injured parties will still not be eligible for compensatory damages. Third, if dismissal by the General Counsel is required before private parties are afforded the opportunity to initiate suit, these parties are not given the option to proceed through the courts independently.[191]

Fourth, critics note that federal judges lack the expertise of administrative law judges and may experience difficulty in applying the more technical provisions of the Act.[192] Finally and most importantly is the inevitable increase in the district court workload that would result from unleashing all unfair labor complaints on the courts.[193] Such a large influx of claims could result in even greater delay in processing than now exists in the NLRB.

---

187. *See* notes 138-42, 152-53 and accompanying text *supra*.

188. *How Business Hopes to Change the Nation's Labor Laws*, 66 U.S. NEWS & WORLD REP., June 16, 1969, at 68. *See* 119 CONG. REC. 6975 (1974) (remarks of Senator Tower).

189. Critics raise the spectre of federal court abuse of injunctions sought by employers to resist unionization prior to the passage of strict anti-injunction laws. Bartosic, *supra* note 7, at 648 n.7.

190. H.R. 9214 in amending Section 10(f) proposes to allow the court to enjoin and take "affirmative action, including reinstatement of employees with or without backpay (but not including the payment of damages in any other form), as may be necessary" to remedy an unfair labor practice.

191. One complaint of practitioners is the lack of control over the handling of the cases accepted by the General Counsel for prosecution. They have no access to the files of the office and although they may be present at hearings, do not actually participate in strategy or trying of a case. Statement of Thomas A. Beckly, Esq. (private practitioner), *Oversight Hearings on NLRA*, *supra* note 88, at 62.

192. The following exchange took place between Congressman Frank Thompson, chairman of the subcommittee, and Vincent Apruzzese, member of the Chamber of Commerce Labor Relations Committee:

> Mr. Thompson: What percentage of district and circuit court judges would you say have extensive labor law experience? . . .
>
> Mr. Apruzzese: Circuit Court of Appeals, in my experience, I would say that few have extensive labor law experience. That would apply in . . . court, . . . that is prior to ascending the bench.

Oversight Hearings on NLRA, *supra* note 88, at 34.

193. Adoption of the . . . district court plan would increase, not reduce, delay. District court trial periods range from six to 39 months, with the courts in states with heavy unfair practice loads generally having the longest trial time lag periods. . . . [S]ome 30,000 labor cases a year could potentially flood the district courts. The resultant delay would not only dilute the effectiveness of the nation's labor laws but also would tax the country's court system beyond tolerable limits and produce delay in non labor cases.

Bartosic, *supra* note 7, at 656 (footnotes omitted). *See* Burger, *Yearend Report*, 62 A.B.A.J. 189 (1976).

VI. Conclusion

It is evident from judicial interpretation of the NLRA that the General Counsel's unreviewable discretion to select cases for NLRB consideration cannot be easily altered by the action of the courts. The accumulated authority opposing review is so overwhelming that every new approach is defeated by the rhetoric of public purpose, administrative discretion, and sheer weight of authority.

The doctrine of public right, developed in response to a need for a uniform national policy in a new and untried field, has outlived its usefulness and is now a barrier to effective remedies. The unlimited discretion of the General Counsel carries a potential for abuse that cannot be justified by deference to administrative expertise. Deprival of remedy by federal preemption and unprecedented delay in obtaining adequate relief are compelling reasons to create a private right. Private suits abound in other areas of federal administrative law to supplement the efforts of federal prosecutors and to provide individual relief.

The mandate of the NLRB—to allow individuals to exercise free choice in unionization and to peacefully settle disputes—could be furthered by provision for actions by private parties. Federal courts have shown their ability to understand and apply the NLRA and could do so with greater consistency than the constantly changing Board.[194] Yet, judicial abstention is so ingrained in the system that legislative action is required to create impetus for change.

While Congress has recognized the necessity for amending the current system, the problem of unreviewability is unlikely to be solved by the proposals currently under consideration. H.R. 8410 fails to provide every citizen with a uniform right to relief.[195] Instead it would create a weapon for harassment by singling out only certain activities for punitive damages. The Modified District Court Plan, although creating a private right of action, stands little chance of passage because of the overwhelming objection of district court overload adding to delay.[196]

Suggested solutions by commentators would also entail major reorganization of the structure of the federal labor system.[197] Perhaps the most equitable and least complex solution would be an amendment to section 10 allowing an optional private cause of action if a claim is first dismissed by the General Counsel. The provision could be modeled on

194. *See* notes 142-52 and accompanying text *supra*.

195. *See* notes 172-77 and accompanying text *supra*.

196. *See* notes 179-93 and accompanying text *supra*.

197. Charles Morris proposes a Federal Labor Court to adjudicate NLRA unfair labor practices complaints under the Railway Labor Act and title VII. The General Counsel or a private party would initiate actions. Morris, *supra* note 7, at 499-509. Florian Bartosic proposes establishment of a Labor Court to replace the court of appeals as a forum for review of Board decisions. He would make the General Counsel's action subject to review to the extent that it was arbitrary or capricious. Bartosic, *supra* note 7, at 662-71.

the Fair Labor Standards Act[198] or the Equal Employment Opportunities Act[199] processes. Although private actions would increase the federal court case load, the claims would be dispersed throughout the country. Identical fears expressed before passage of the EEOC amendments proved to be exaggerated.[200] No substantive change in the body of labor law is contemplated. No problem of res judicata in multiple suits on the same issue would arise. It would simply provide an opportunity for every person to have his day in court.[201]

The necessity for providing every person with an opportunity to present his claim, quick and efficient relief, and some form of judicial control requires congressional action. The solution should not give either labor or management an unfair advantage, but should enable the private and public sector to work together to achieve industrial peace.

BARBARA L. ROMBERGER

198. The Fair Labor Standards Act provides three alternatives for the charging party: individual suit, class action, and governmental representation. *See* notes 139-41 and accompanying text *supra*. From the viewpoint of most practitioners this would be preferable so that they could choose the best method to fit each situation. Costs to the taxpayer of investigation would decrease because the burden of investigation would shift to the citizen. It could increase the speed and efficiency of relief and repeal the unreviewable authority of the General Counsel. *Oversight Hearings on NLRA*, *supra* note 88, at 61-62.

199. The EEOC requires dismissal of the complaint prior to individual action. *See* notes 131-38 and accompanying text *supra*. A similar process for labor violations would give parties an opportunity for final judicial review of a dismissed complaint.

200. *See* Address of John Erlenborn, *supra* note 6, at 223-24.

201. *Id.*